

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

B.R. and J.R., as parents and  
guardians for, and their son, G.R.,

Plaintiffs,

v.

PROSSER SCHOOL DISTRICT  
NO. 116, a Washington municipal  
corporation,

Defendant.

NO. CV-08-5025-RHW

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS, IN PART**

Before the Court is Defendant's Motion to Dismiss (Ct. Rec. 33). The motion was heard without oral argument.

Defendant moves to dismiss the above-captioned action, asserting that the Court lacks jurisdiction because Plaintiffs' complaint is barred by the Individuals with Disabilities Act (IDEA) 90-day statute of limitations.

**BACKGROUND FACTS**

Plaintiffs are challenging an Administrative Law Judge's decision regarding the placement of their son, G.R., for the school year 2007-2008. G.R. has been diagnosed with Asperger's Syndrome/Autism Spectrum Disorder and ADD/ADHD.

From July, 2006 to June, 2007, Plaintiffs placed G.R. in Woods, a private

1 residential treatment facility located in Pennsylvania.<sup>1</sup> Plaintiffs were unable to  
2 afford the tuition at Woods for the 2007-2008 school year, so G.R. was educated in  
3 the Prosser School District.

4 The instant case involves the 2007-2008 school year. Plaintiffs sought  
5 placement of G.R. at the Woods, at public expense. A hearing was held in January,  
6 2008. On January 30, 2008, the ALJ issued a decision denying the parents' claims.  
7 On January 30, 2008, the ALJ issued a decision denying the parents' claims.  
8 Plaintiffs filed this lawsuit on April 28, 2008.

9 After filing the complaint, Plaintiffs moved the Court to open the  
10 administrative record and consider additional evidence that was later discovered.  
11 After a hearing on the motion, the parties agreed that the proper course of action  
12 would be to remand the case back to the Administrative Law judge so he could  
13 consider the new evidence and thereafter issue a ruling.

14 The ALJ issued his final decision on July 15, 2009. On October 14, 2009,  
15 Plaintiffs filed a Petition for Judicial Review and Complaint under the IDEA (Ct.  
16 Rec. 31). There was some confusion regarding whether Plaintiffs were required to  
17 pay another filing fee. Plaintiffs also filed a Motion to Reopen, which the Court  
18 granted (Ct. Rec. 32).

19 The ALJ found that the behavior logs of March 22, 2006 through May 31,  
20 2006 were of marginal relevance, not material, cumulative, and provided no  
21 qualitative difference from the behavior logs. Ultimately, the ALJ found that the  
22 log did not change the outcome of the case.

### 23 ANALYSIS

24 Under the IDEA, "[t]he party bringing the action shall have 90 days from the  
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26 <sup>1</sup>Woods Service, Inc. is a non-public academic and residential placement  
27 program for students with autistic spectrum disorders, located in Langhorne,  
28 Pennsylvania.

1 date of the decision of the hearing officer to bring such an action, or if the State has  
2 an explicit time limitation for bringing such action under this subchapter, in such  
3 time as the State law allows.” 20 U.S.C. § 1415(i)(2)(B). Washington State has  
4 adopted the federal time limitation. *See* Wash. Adm. Code § 392-172A-05115(2).

5 Plaintiffs take the position that their October 14, 2009 filing was timely.  
6 The Court disagrees. The Court computes the expiration of the statute of  
7 limitations on October 13, 2009. The ALJ issued his final decision on July 15,  
8 2009. Ninety days from July 16, 2009 falls on October 13, 2009.

9 The Ninth Circuit has not ruled whether the statute of limitations in the  
10 IDEA is jurisdiction, or whether it is subject to equitable tolling.<sup>2</sup> In *Wall Tp. Bd.*  
11 *of Educ. v. C.M.*, 534 F.Supp.2d 487 (D.N.J. 2008), the district court ruled that the  
12 90-day time limit was not jurisdiction, rather it was subject to waiver, estoppel, and

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14 <sup>2</sup>Prior to 2004, the IDEA had no statute of limitations, so courts generally  
15 borrowed the state’s statute of limitations from the Washington Administrative  
16 Procedures Act. *See S.J. v. Issaquah School Dist. No. 411*, 470 F.3d 1288, 1289  
17 (9<sup>th</sup> Cir. 2006). In that case, the Circuit held that “[u]nder federal law, however, the  
18 failure to meet a state’s borrowed statute of limitation is not jurisdictional in IDEA  
19 actions.” *Id.* at 1290.

20 In 2004, the IDEA was amended to provide a limitations period of 90 days,  
21 unless a state adopts a limitations period explicitly applicable to the IDEA claim, in  
22 which case that period applies. The Seventh Circuit reviewed the amendment and  
23 concluded that “timely filing may be a condition to success, but it is not a  
24 jurisdictional requirement in federal court.” *Farzana v. Ind. Dep’t of Educ.*, 473  
25 F.3d 703, 705 (7<sup>th</sup> Cir. 2007).

26 In *JG v. Douglas County Sch. Dist.*, 552 F.3d 786 (9<sup>th</sup> Cir. 2008), the Circuit  
27 recognized that there is some question regarding whether the IDEA exhaustion  
28 requirement is jurisdiction, but did not answer the question in that case.

1 equitable tolling. The district court reasoned that time prescriptions created by  
2 state laws cannot be jurisdictional because only Congress may determine a lower  
3 federal court's subject-matter jurisdiction. By permitting the states to set the time  
4 limit, Congress intended § 1415(i)(2)(B) to be subject to waiver, estoppel and  
5 equitable tolling.

6 Here, the Court adopts the reasoning of the district court and finds that the  
7 IDEA exhaustion requirement is not jurisdictional. Even so, Plaintiffs have failed  
8 to establish that equitable tolling should be applied to excuse the late filing.

9 Even so, the Court does not find that it is appropriate to dismiss the entire  
10 case. The Court has not yet addressed the underlying appeal that was filed on  
11 January 20, 2009. The remand back to the ALJ was limited in scope. The ALJ  
12 was asked to determine whether the record should be opened to include the missing  
13 logs. He decided that it should not, and it is the appeal of this decision that is  
14 barred by the statute of limitations.

15 Plaintiffs timely filed their appeal of the ALJ's January 30, 2008 appeal and  
16 the interest of justice is served by the Court hearing this appeal.<sup>3</sup>

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendant's Motion to Dismiss (Ct. Rec. 33) is **GRANTED**, in part.  
19 The Court **strikes** the Amended Complaint (Ct. Rec. 31).

20 2. Within 10 days from the date of this order, the parties are directed to  
21 meet and confer and present the Court with a Joint Briefing Schedule.

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26 <sup>3</sup> It is true that the Court closed the file on January 20, 2009. The decision to  
27 do so was for court record management purposes and was not reached after input  
28 from the parties.

1       **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
2 Order and forward copies to counsel.

3       **DATED** this 26<sup>th</sup> day of February, 2010.

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5                               s/Robert H. Whaley  
6                               ROBERT H. WHALEY  
7                               United States District Judge

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